APPENDIX C

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **ROBERT HARTLEY COLLINS,** Defendant and Appellant.	S_____ SUPREME COURT FILED APRIL 28, 2003 FREDERICK K. OHLRICH

Fourth Appellate District, Division Three, No. G027376
Orange County Superior Court No. 97NF3729
The Honorable Frank F. Fasel, Judge

PETITION FOR REVIEW

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

S____

v.

ROBERT HARTLEY COLLINS,

Defendant and Appellant.

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Respondent respectfully petitions this Court to grant review, under rule 28 of the California Rules of Court, following the March 24, 2003 unpublished decision of the Court of Appeal, Fourth Appellate District, Division Three. This case raises an open question regarding a defendant's right to self-representation under *Faretta v. California* (1975) 422 U.S. 806, 807 [95 S.Ct. 2525, 45 L.Ed.2d 562](*Faretta*).

ISSUE PRESENTED

Is *Faretta* error in plea and sentencing proceedings reversible per se?

REASONS FOR REVIEW

The defendant in this case wanted to represent himself so that he could plead guilty to the charges filed in the indictment. Although his request for self-representation was denied, he waived jury trial and, after a slow plea, ultimately got the exact conviction and sentence he wanted. The Fourth District Court of Appeal, Division Three, reversed his conviction for *Faretta* error, holding that it had no choice but to apply the per se reversal rule annunciated in *People v. Joseph* (1983) 34 Cal.3d 936, 946 (*Joseph*). But a careful reading of *Joseph,* and the relevant decisions from the United States Supreme Court, shows that this is an open question. No court has held that *Faretta* error at plea and sentencing proceedings is reversible per se.

Indeed, *Joseph* and the pertinent decisions by the United States Supreme Court are carefully limited to a defendant's right to conduct his own defense, with an emphasis on the right to defend oneself at trial. The error is reversible per se, under these particular circumstances, because application of a harmless error analysis would all but eviscerate the right given that a defendant is almost always better off being represented by a lawyer at trial. This is not necessarily true in plea and sentencing proceedings. It makes no sense to reverse a case,

such as this one, where the defendant did not want to conduct a defense. The defendant wanted to plead guilty and eventually he got the exact conviction and sentence he wanted. And it certainly makes no sense that the negligible dignity interest afforded by *Faretta*, in plea and sentencing proceeding before a judge, should always outweigh the potential harm to the victims posed by the threat of retrial, or the increased burdens placed upon the prosecution and the court.

The problem is that the lower courts feel bound by *Joseph*. The exception to the rule of per se reversal must be established by this Court. Thus, the People respectfully ask this Court to grant review to examine whether *Faretta's* rule of per se reversal applies in plea and sentencing proceedings.

PROCEDURAL AND FACTUAL HISTORY

a. The Crimes

On December 19, 1997, appellant sexually assaulted and threatened to kill his former wife Jennifer while their three-and-a-half year old daughter, and another child, an infant, were in the apartment. (CT 4-8; Supp. CT 3; CT 7.) About 3:50 a.m., he used a ruse to enter and concealed a rag and a bottle of chloroform with the intent to render Jennifer unconscious. In the apartment's kitchen, appellant placed a rag doused with

chloroform over her face and the two struggled and fell to the floor. Jennifer hit appellant on the head with a water glass, which caused him to drop the rag, but in the next moment he procured a knife from the kitchen counter, held it to her throat, and dragged her into the living room. (Supp. CT 3-4; CT 4-13.) There, appellant poured chloroform onto one of the couch pillows and again attempted to render her unconscious. He stopped when their daughter entered the living room. Seeing the girl, he ordered her to her room and dragged Jennifer into the master bedroom, where he forced her to the floor and threatened to kill her. He eventually told her to get on her knees, and while holding the knife, commanded her to orally copulate him. She did so twice. (Supp. CT 4-5; CT 14-25.) Appellant then bound and gagged Jennifer. He said that he badly wanted to kill her, and that he had been planning to do so for a long time, but that he could not go through with it. (Supp. CT 5, 9; CT 25-28.) He eventually freed her around 6 a.m., after a two-hour ordeal. (Supp. CT 6; CT 30-34.)

b. Proceedings In The Trial Court

On March 23, 1998, the Orange County District Attorney filed an information charging appellant with forcible

oral copulation (count 1; Pen. Code, § 288a, subd. (c))[1/], assault with intent to commit rape (count 2; §§ 220, 261, subds. (2)(3)), corporal injury on the mother of a child (count 3; § 273.5, subd. (a)), first degree burglary (count 4; §§ 459, 460, subd. (a)), false imprisonment by violence (count 5; § 236), and misdemeanor child abuse (count 6; § 273a, subd. (b)). With respect to count 1, the information further alleged that appellant used a deadly weapon (§ 12022.3, subd. (a)) and that the crime was punishable under the one-strike rape law because of the residential burglary (§ 667.61, subds. (a)(b)(e)(2)) and the weapon use (§ 667.61, subds. (a)(b)(e)(4)). (CT 57-59.)

On September 11, 1998, appellant was represented by counsel and pled guilty to counts 1 through 6 and admitted the weapon use allegation. (CT 77-80; RT 19-30.) In exchange, the prosecutor struck the one-strike rape allegations, which left a potential maximum prison term of 22 years and eight months rather than a mandatory indeterminate life term. (CT 80; RT 23.) At sentencing on February 19, 1999, appellant was moved by the statements of the victim and her sister and asked the court to reinstate the one-strike rape allegations and put him in prison for life. (CT 85; RT 37-38.) Appellant threatened to

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1. Further statutory references are to the Penal Code unless otherwise specified.

commit crimes in prison in order to extend his sentence if the court refused. (RT 48.)

The case was continued to March 12, 1999, at which time the court stated that it understood appellant's comments as an implied future threat of harm to prison inmates. (RT 53.) In the interim, appellant had sent the court a letter in which he said that he would not harm inmates but would "do everything possible to pick up D.A. referrals." (RT 53; Sealed CT 148-149.) Appellant essentially told the court that he would commit crimes to extend his sentence (such as drug offenses), but that he would not hurt anyone. (RT 54-55.) The court said that it could not sanction a plea bargain when appellant was threatening to commit future crimes if he were not given a life sentence. Hence, the court rejected the plea bargain, set aside the plea, and reinstated the charges. (CT 87-89A; RT 59.)

After the charges were reinstated, appellant's retained attorney stated there were irreconcilable differences with her client and, after confirming that appellant wanted to fire her, asked to be relieved. Appellant said that he did not need an attorney and asked to represent himself. The court relieved retained counsel, and after confirming that appellant intended to plead guilty to all the charges and the one-strike rape allegation without going to trial, appointed a psychologist to render an opinion concerning whether appellant had the

capacity to represent himself. (RT 61-63; CT 90-91A; Aug. RT 1-6; Sealed CT 109-110.)

On May 21, 1999, the court found that appellant did not have the mental capacity to make a knowing and intelligent waiver of his right to an attorney, not as a matter of intelligence, but rather as a result of psychological and emotional difficulties. (RT 72-77; CT 92; Sealed CT 122-124.) It appointed a lawyer. (CT 93; 6-4-99 RT 6-7.)

On July 9, 1999, appellant's appointed lawyer asked the court to conduct a Penal Code section 1368 evaluation. (Aug. RT 7.) The court suspended proceedings and ordered an examination. (CT 95-96A; Aug RT 8-9.) On August 27, 1999, the court found that appellant had not rebutted the presumption of mental competence and reinstated criminal proceedings. (Sealed CT 113-121, 135-139; CT 98-99; RT 80.) In so ruling, the court committed *Faretta* error because competence to waive the right to counsel must be measured by the same standard as competency to stand trial. (*Godinez v. Moran* (1993) 509 U.S. 389, 400-401 [113 S.Ct. 2680, 125 L.Ed.2d 321]; *People v. Welch* (1999) 20 Cal.4th 701, 733.)

On November 19, 1999, appellant's appointed lawyer told the court that appellant wanted to submit the case on the transcripts (a slow plea) to avoid bringing his former wife and daughter into court. (RT 82-84.) Thereafter, appellant waived

his right to a jury trial. (CT 102; RT 85-88.) The court took evidence in appellant's slow plea (consisting of the preliminary hearing examination, the police report, and two forensic reports) and the defense presented no evidence or argument. (RT 96-99, 102; CT 103; Supp. CT; Exhs. 1-4.) The trial court then found appellant guilty of all charges and found true all allegations, and sentenced appellant to a mandatory indeterminate prison term of 25 years to life. (RT 102-103; CT 104-105, 255-256.)

c. The Court Of Appeal's Opinion

The Fourth District Court of Appeal, Division Three, upheld the trial court's decision to reinstate criminal proceedings (Opn. at 8-11), but reversed because of *Faretta* error. The Court of Appeal held that the "type of error" exhibited in this case was subject "only to the reversible per se standard." (Opn. at 6.) The Court of Appeal held that it was bound to reverse this conviction under *Joseph* and the rule of stare decisis. (Opn. at 5.)

ARGUMENT

1.

REVIEW IS NECESSARY TO DECIDE WHETHER THE RULE IN *PEOPLE V. JOSEPH* (1983) 34 CAL.3D 936, MAKING *FARETTA* ERROR REVERSIBLE PER SE, APPLIES TO PLEA AND SENTENCING PROCEEDINGS

Neither the United States Supreme Court, nor this Court, has held that *Faretta* error should be reversible per se in plea and sentencing proceedings. The language of the cases themselves, as well as strong policy concerns, suggest that this should not be the law. Review is necessary to settle this important question, and protect the victims, prosecution, and the court from the prospect of unnecessary retrials.

The high court's decision in *Faretta* says that a state may not force a lawyer upon a criminal defendant "when he insists that he wants to conduct his own defense." (*Faretta v. California*, *supra*, 422 U.S. at 807; emphasis added.) The opinion stresses that the Sixth Amendment "constitutionalizes the right in an adversary criminal trial to make a defense as we know it." (*Id.* at 818; emphasis added.) The "right to defend is personal" because it is the defendant, not the lawyer, who will bear the consequences of conviction. (*Id.* at 834; emphasis

added.) Thus, the accused must acquiesce in representation before the defense adopted at trial is "*his* defense." (*Id.* at 821; emphasis in original.)

The United States Supreme Court made this reading of *Faretta* explicit in *Martinez v. Court of Appeal of California* (2000) 528 U.S. 152, 161 [120 S.Ct. 684, 145 L.Ed.2d 597](*Martinez*). There, the Court held that the right to self representation did not extend to appeal. (*Id.* at 154.) In so doing, the Court specifically held that, "Our conclusion in *Faretta* extended only to a defendant's 'constitutional right to conduct his own defense.'" (*Ibid*; emphasis added.) The Court likewise made many statements focusing on the right to "defend oneself at trial." (*Martinez v. Court of Appeal of California*, *supra*, 528 U.S. at 161.) For example, the Court stated that "the *Faretta* majority found that the right to self-representation at trial was grounded in part in a respect for individual autonomy." (*Id.* at 160; emphasis added.) The Court stated that, "Although we found in *Faretta*, that the right to defend oneself at trial is 'fundamental' in nature (citation), it is clear that it is representation by counsel that is the standard, not the exception." (*Id.* at 161, emphasis added.) The Court also stated that, even at the trial level, "the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's in acting as his own lawyer." (*Id.* at

162; emphasis added.)

The same sort of limiting language is found in the high court's cases discussing the rule of per se reversal. In *McKaskle v. Wiggins* (1984) 465 U.S 168, 177, fn.8 [104 S.Ct. 944, 950, 79 L.Ed.2d 122], the Court stated in dicta that, "Since the right to self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis." In the next paragraph, the Court stated, "Moreover, the defendant's right to proceed *pro se* exists in the larger context of the criminal trial designed to determine whether or not a defendant is guilty of the offense with which he is charged." (*Id.* at 177-178; emphasis added.) Likewise, the high court's decision in *Arizona v. Fulminante* (1991) 499 U.S. 279, 310 [111 S.Ct. 1246, 113 L.Ed.2d 302], stated that the rule of per se reversal applies to the "the right to self-representation at trial." (emphasis added.) Nothing in the high court's decisions remotely extends the rule of per se reversal to plea and sentencing proceedings.

This Court's decision in *People v. Joseph*, *supra*, 34 Cal.3d 936, creating a rule of per se reversal for *Faretta* error, was also limited to the right to present a defense at trial. The opinion explained that the primary motivation for *Faretta* was "respect for the accused's freedom of choice to personally

conduct his own defense." (*People v. Joseph*, *supra*, 34 Cal.3d at 946, emphasis added.) The Court held that a reviewing court could not apply a prejudice analysis when an accused was forced to "go to trial represented by counsel." (*Ibid.*; emphasis added.) The Court noted that a rule of per se reversal guaranteed that the defendant was not "deprived of his free will to make his own choice, in his hour of trial, to handle his own case." (*Ibid.*; quoting *United States v. Dougherty* (D.C. Cir. 1972) 473 F.2d 1113, 1128; emphasis added.) The Court held that to apply a harmless error analysis under these circumstances would erode the right to self-representation because criminal defendants would usually be better served by skilled counsel. (*Id.* at 946-947.) Moreover, it would be difficult to assess the effect of the error because "an assessment of why or how an accused's trial was disadvantaged by injecting an undesired attorney into the proceedings would require an impossibly speculative comparison between the accused's undisclosed pro se strategy and that of counsel." (*Ibid*; emphasis added.) Thus, like the United States Supreme Court, this Court has never decided whether a per se reversal rule should apply in plea and sentencing situations. The question is open.

Further, the reasoning in *Joseph* does not necessarily extend to the situation presented in this case. Two other

important rules of law support this position. First, even when represented by a lawyer, a defendant's decision to plead guilty is a matter lying within the defendant's, rather than his counsel's, ultimate control. (*People v. Medina* (1990) 51 Cal.3d 870, 899.) And when entering a plea, a court must take express waivers from the defendant. (*Boykin v. Alabama* (1969) 395 U.S. 238 [89 S.Ct. 1709, 23 L.Ed.2d 274] ; *In re Tahl* (1969) 1 Cal. 3d 122.) These rules help to guarantee that, when a defendant pleads guilty, he is doing what he wants to do. They protect a defendant's dignity interest, and ensure that he is the "master"of his plea. (See *Faretta*, *supra*, 422 U.S. at 820.) Second, once a defendant has pled guilty, he is no longer entitled to the presumption of innocence. While this does not eliminate his right to counsel at sentencing, the nature of the right to self-representation changes dramatically. (See, *Martinez*, *supra*, 528 U.S. at 162-163.) This is especially true where the sentence to be imposed is mandatory. Hence, in plea and sentencing proceedings, there is little chance that counsel will run rough-shod over a defendant's defense strategy. Substantial protections assure that the defendant is doing what he wants to do, and the proceedings are before a judge rather than a jury. These circumstances greatly undermine the need for a rule of per se reversal.

The foregoing analysis shows that *Faretta* and the

cases requiring per se reversal are not controlling when a defendant is not seeking to present a particular defense at trial. It also shows that there are fundamental differences between the right to self-representation at trial and the right to self-representation at plea and sentencing proceedings. This is not to say that the right to self-representation does not exist during these proceedings, nor is it to say that a defendant's dignity interest is non-existent in these proceedings, but it is to say that a rule of per se reversal makes no sense. This case demonstrates why.

Here, the defendant wanted to represent himself, not to defend himself, but so that he could plead guilty to all the charges. He did not want to present a particular defense. In fact, he did not want a jury trial and he did not want to present a defense. He personally waived the right to a jury trial in favor of a slow plea before a judge, and elected to present no defense evidence. This guaranteed a guilty verdict on all counts. Further, the guilty verdict under the one-strike rape law mandated an indeterminate life sentence. It is also important to note that this was not a passing fancy or an impetuous act - the defendant steadfastly maintained his position for eight months until he eventually got the indeterminate life sentence he desired. These facts show that the defendant got exactly what he wanted, with the sole exception that he got it in the company

of an attorney. A rule of per se reversal makes no sense under these circumstances.

It makes even less sense when one considers the rights of the victims. The defendant's former wife was forced to endure two hours of sexual assaults and death threats while her two young children slept in adjacent rooms. If the family has managed to settle in the past five years, the prospect of a retrial in this case again will threaten to again rip their lives apart. While it is possible that the defendant will again plead guilty, he may not. He may have changed his mind after five years in prison. Should he now be permitted to drag the victims through trial (his former wife and daughter who is now eight), and perhaps escape punishment, because the trial court erroneously prevented him from representing himself so that he could plead guilty?

While less compelling than the harm to the victims, the court and prosecution will also be prejudiced by a retrial in this case. As the Court stated in *Morris v. Slappy* (1983) 461 U.S. 1, 14 [103 S.Ct. 1610, 75 L.Ed.2d 610], "The spectacle of repeated trials to establish the truth about a single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources." (*Ibid.*) Such is the case here.

The irony of this sort of situation was alluded to by

Justice Chin in his recent concurring opinion in *People v. Dent* (2003) 2003 D.A.R. 3911. There, Justice Chin pointed out that the capital defendant whose *Faretta* right was violated would not be precluded from requesting a lawyer upon retrial, thereby giving the defendant two trials in which he was represented by counsel. (*Id.* at 3914.) The irony would be equally compelling here, since the defendant would not be compelled to plead guilty. He could get a lawyer and could decide to go to trial. He could put the prosecution at the decided disadvantage of trying this case, for the first time, many years after the events. Further, he could put the victims through tremendous and unnecessary trauma - or worse yet - get a substantially reduced plea agreement because the victims are no longer willing to testify.

The People also want to point out that these issues arise often enough to deserve the consideration of this Court. (See e.g. *People v. Robinson* (1997) 56 Cal. App.4th 363, 370 fn. 2 [2-1 decision holding that *Faretta* issue could be raised after plea of no contest]; see also the pending capital appeal in *People v. Marlow* (S026614)). For these reasons, the People respectfully ask this Court to grant the petition for review.

CONCLUSION

Because neither this Court, nor the United States Supreme Court, has held that denial of the right to self-representation should be reversible per se outside trial proceedings, this case presents an important and undecided question of federal constitutional law. The language of the seminal cases, and strong policy concerns, suggest that a rule of per se reversal should not apply to these situations. Review is

warranted to settle this important issue, and protect the victims, prosecution, and the court from the prospect of an unnecessary trial.

Dated: September 2, 2003

Respectfully submitted,

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